

NTSB Order No. EA-4778

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 30th day of June, 1999

Docket SE-15198

the non-flying pilot on a Part 121 flight, deviated from an air traffic control (ATC) instruction, in violation of section 91.123(b) of the Federal Aviation Regulations (FARs), 14 C.F.R. Part 91.² The Administrator did not seek any suspension time. As discussed below, we deny the appeal.

Respondent admitted to all the paragraphs in the complaint and states on appeal that he agrees with the characterization of the facts as summarized by the law judge. In short, on June 22, 1997, respondent was the first officer of TWA Flight 160 from Albuquerque to St. Louis and operated the aircraft on that leg of the flight. Captain Lessel was the non-flying pilot and worked the radios. In preparation for approach, ATC instructed TWA Flight 160 to descend and maintain 7,000 feet altitude and, as the law judge found, Captain Lessel acknowledged the instruction, but then entered 5,000 rather than 7,000 feet into the altitude alerter.³ The aircraft had descended to 6,400 feet when ATC

²Respondent Lessel also appealed the law judge's decision but later withdrew his appeal.

Section 91.123 states, in pertinent part:

§ 91.123 Compliance with ATC clearances and instructions.

* * * * *

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

³Captain Lessel claimed that he did not hear the clearance because he was communicating with the company at the time, and that it was respondent who had the radios when the clearance was issued, acknowledged the clearance, and entered the wrong altitude into the altitude alerter. Respondent stated that he did not remember hearing or acknowledging the clearance, or entering the altitude. The law judge found that it was Captain Lessel who acknowledged the clearance and dialed in the wrong

asked to what altitude they were going.

By admitting to the factual allegations in the complaint, respondent then assumed the burden of proving the affirmative defense of reasonable reliance on the non-flying pilot's proper performance of his responsibilities. See Administrator v. Morrison, NTSB Order No. EA-4119 at 2-3 (1994). He claims that he was busy with his "primary responsibility, flying the airplane," and was entitled to rely on the non-flying pilot to perform his own duties. Thus, respondent asserts, the law judge erred in not accepting this as a defense.

We cannot agree with respondent's argument. Part of his responsibility to "fly the airplane" is his responsibility to adhere to the procedures in the applicable flight handbook. In this instance, the TWA MD-80 flight handbook states that "[a]fter receipt and confirmation of any ATC clearance, the pilot flying will repeat aloud his understanding of the clearance to assure that the pilot not flying is aware of the altitude and clearance limit to which the flight is cleared." (Exhibit R-1.) No evidence was introduced to indicate that respondent repeated the clearance aloud.⁴

The reasonable reliance defense, as discussed in Administrator v. Fay & Takacs, NTSB Order No. EA-3501 at 9

(..continued)
altitude. (Transcript (Tr.) at 113-14.)

⁴Captain Lessel testified that it was not done. (Tr. at 57.) As for respondent, it was revealed through his testimony that he remembers very little about the flight.

(1992), is not available to respondent given the facts of this case. He had an independent obligation, as illustrated by the TWA MD-80 flight manual, to repeat the clearance, and he had the ability to ascertain the correct clearance, by listening and repeating that clearance.⁵ See also Morrison, supra.

We have been presented with no reason to overturn the decision of the law judge.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The initial decision of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁵Administrator v. Nutsch, NTSB Order No. EA-4148 (1994), aff'd, 55 F.3d 684 (D.C. Cir. 1995), cited by respondent, is not helpful here. In that case, Mr. Nutsch (the non-flying pilot) admitted he heard the clearance and had the responsibility to enter it into the autopilot altitude selector but that, nevertheless, his copilot undertook the task and evidently entered the wrong altitude into the selector. We found that he "did not satisfy the duties of a reasonable and prudent pilot when he assumed that the copilot would correctly enter the cleared altitude." Id. at 6.

Respondent's argument that he had been "busy flying the airplane" and should not be expected to listen for the altitude clearance is not supported by Nutsch, where we specifically "declin[ed] to find that other duties 'were so extensive or more significant that such a fundamental matter as altitude clearance might be justifiably ignored, especially during ascent and descent.'" Id. at 5-6, citing Administrator v. Frederick and Ferkin, NTSB Order EA-3600 (1992), at 6-7.

Respondent's citation of Administrator v. Boynton, SE-9371, a non-precedential case, is also unpersuasive.